UNITED MALAYAN BANKING CORP. BHD.

v.

DEVELOPMENT & COMMERCIAL BANK LTD. BHD.

FEDERAL COURT, JOHOR BAHRU
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 33 OF 1981]
10 NOVEMBER 1982

LAND LAW: *Private caveat - Application by chargee for removal under s. 327, National Land Code - Whether chargee "aggrieved" person - Whether caveator had caveatable interest - Section 323(1)(a) - Effect of conditional undertaking by proprietor to grant second charge - Onus of proof.*

The respondents were the chargees of the land, the subject-matter of the dispute. MPC Holdings Sdn. Bhd. were the registered proprietors. The appellants had entered a private caveat on the land and the respondents successfully applied for its removal. The appellants appealed contending that the respondents were not "aggrieved" persons within the meaning of s. 327 of the National Land Code. Furthermore, the appellants claimed that they had a caveatable interest in the land arising from the undertaking by the proprietors to grant a second charge in their favour and that they had in fact restructured their loan facilities as a result of the undertaking.

Held:

[1] The respondents were a party aggrieved by the existence of the caveat. The caveat would have prevented any attempt to sell the land or to register any certificate of sale even if a definite sale agreement had been entered into.

[2] The appellants had no caveatable interest in the land. The proprietors had given a conditional undertaking to grant the appellants a second charge but were unable to honour the undertaking as the other creditors had refused to give their consent. Any restructuring of their loan facilities made by the appellants was not related to the land, nor was the land purchased with any loan made by the appellants. Therefore, the appellants did not come within the scope of s. 323(1)(a) of the Code.

[3] The appellants had failed to satisfy the Court that their claim to an interest in the land raised a serious question to be tried. The onus is upon the caveator in an application by the caveatee under s. 327 for removal of a caveat to first satisfy the Court that his claim to an interest in the property does raise a serious question to be tried and secondly to show that on the balance of convenience it would be better to maintain the *status quo*.

[Appeal dismissed with costs.]

Cases referred to:

R.A.P. Nathan v. Haji Abdul Rahman bin Haji Yusoff & Ors. [1980] 2 MLJ 250
Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh [1972] 1 MLJ 145
Jit Kaur v. Parl Singh [1974] 2 MLJ 199
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212

Legislation referred to:

National Land Code 1965, ss. 68, 256, 259(3), 322(2), 323, (1)(a), (b), 327, (1)

Other sources referred to:
Stroud's Judicial Dictionary

For the appellants - Dr. Stephen Goh; M/s. Stephen Goh & Partners
For the respondents - K. Thayalan; M/s. Skrine & Co.

JUDGMENT

Wan Suleiman FJ:

This is an appeal by the United Malayan Banking Corporation Berhad who were defendants in the Court below against an order to set aside a private caveat.

It is not disputed that the registered proprietors of the land comprising in holding No. HS (D) 11230, Lot 413, Mukim of Tebrau are the MPC Holdings Sdn. Bhd., that the respondents as from 20 March 1979 are the registered chargees thereof, that the charge was registered to secure the recovery of a loan of RM35 million granted by the respondents to MPC Holdings and that the appellants had entered a private caveat on the register document of title of the land on 21 May 1979.

From the documents filed in support of the originating summons by the respondents and those with the affidavit in reply filed by the appellants, the learned trial Judge found the following facts proved:

(a) MPC Holdings purchased the said land from the Joint Liquidators of Raja Enterprises Limited on 31 January 1978 with monies lent by the plaintiff;

(b) MPC Holdings did not purchase the said land with any money advanced by the United National Finance Berhad, a subsidiary of the defendants;

(c) no loan was granted by the United National Finance Berhad to MPC Holdings for the purpose of purchasing the said land;

(d) no charge was registered in the document of title to the said land in favour of the United National Finance Berhad;

(e) the sale agreement between Mosbert and MPC Holdings dated 17 January 1976 never came into effect and it is reasonable to infer that the said sale agreement was rescinded;

(f) the defendants in Borang 19B, an application for the entry of the private caveat, represented that a sum of RM10 million was advanced to MPC Holdings by the United National Finance Berhad for the purchase of the said land which representation was not true;

(g) the defendants failed to disclose in Borang 19B or the supporting Statutory Declaration or Affidavit that MPC Holdings had not taken a loan of RM10 million from the United National Finance Berhad and such non-disclosure amounted to a suppression of material facts;

(h) the defendants represented in Borang 19B that MPC Holdings had given an unconditional undertaking to create a second charge in favour of the defendants which representation was not true;

(i) the undertaking made by MPC Holdings to give a second charge on the said land in favour of the defendants was conditional upon the consent of all unsecured creditors of MPC Holdings which ultimately informed the defendants that it failed to procure the said consent:

(j) the restructuring of the loan facilities was approved by the defendants but no restructuring was effected;

(k) if the restructuring of the loan facilities was in fact effected, such restructuring was not based on the undertaking to grant a second charge on the said land by MPC Holdings;

(l) the private caveat was entered by the defendants on the register document of title to the said land in anticipation of the execution of a second charge in favour of the defendants but the defendants in filing Civil Suits Numbers 721, 722 and 723 of 1979 at Kuala Lumpur High Court did not seek specific performance for the execution of the charge and so the ground for continuing the caveat has since ceased to exist; and

(m) one, Dato Wong Kee Tat had agreed to purchase the said land for RM61 million.

Subject to what we have to say regarding item (m) hereinafter, we would agree with the finding of the learned trial Judge.

The respondents applied for the removal of the caveat under s. 327 of the National Land Code. Since they were not the proprietors of the land, his Lordship rightly held that they had to satisfy the Court that they are a party aggrieved by the existence of the caveat.

The respondents claim that the existence of the caveat has prejudiced their registered interest as chargees. The learned Judge was satisfied that there was evidence to show that one Dato Wong Kee Tat had offered to buy the land for RM61 million. Assuming that the proprietors of the land had agreed that that was a fair price and were willing to close the deal, his Lordship added, the caveat would prevent the registration of the certificate of sale on the register of title because of the provisions of s. 322(2) of the National Land Code. He therefore held that for the purposes of s. 327 of the Code the respondents are a body aggrieved by the existence of the caveat.

For the appellants it was argued firstly that the chargee (respondents), not being a registered proprietor under s. 327 of the National Land Code (NLC) must show that he is an aggrieved person.

For ease of reference, s. 327(1) is set out hereunder:

> 327. (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

Dr. Stephen Goh for the appellants submits that the fact of a charge *per se* does not confer on the chargee the status of an aggrieved person under s. 327, and that the caveat in no way affects the charge.

We were referred to the definition of the word "person aggrieved" in *Stroud's Judicial Dictionary* which states - "The word "aggrieved" connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something."

We were also referred to a High Court decision *R.A.P. Nathan v. Haji Abdul Rahman bin Haji Yusoff & Ors.* [1980] 2 MLJ 250.

In that case the land in question, Malay reservation land originally belonged to the first defendant. He sold it to the second defendant who entered into a joint venture with the plaintiff to develop the land. Subsequently the 2nd defendant agreed to sell and transfer the land to the third defendant who in turn transferred the land to a limited company in which he was the managing director. The plaintiff sought a declaration that the agreement between

the 2nd and 3rd defendants was void and also claimed specific performance of the agreement between him and 2nd defendant. He also entered a caveat against the land, and this caveat was extended by Court.

3rd defendant applied *inter alia* for the caveat entered by plaintiff to be set aside. The learned trial Judge applied the test of whether the former would suffer loss if the caveat was not removed and held on the facts that he would indeed suffer loss, and was therefore a person aggrieved by its existence within the meaning of s. 327(1) of the Code.

Our attention was drawn to the fact that whilst the trial Judge had earlier found that one Dato Wong Kee Tat had **agreed to purchase** the land, he later modified this finding, and stated instead that Dato Wong had **offered to** buy the land at RM61 million. Dr. Goh's contention is that a mere offer is not good enough to confer on the chargee that status of an aggrieved party. Section 322(2) of the National Land Code, as the learned Judge noted *inter alia* provides:

> (2) The effect of any private caveat expressed to bind the land itself shall, subject to subsections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of:
>
> (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

Alternatively, says Dr. Goh, the respondent must come with a certificate of sale before he can be regarded as an aggrieved party. There was, he said, no evidence of any action by respondent to foreclose, and consequently no certificate of sale was ever issued (under s. 259(3) of the Code).

Mr. Thayalan's reply to this last point is this. Any application by the respondents for an order for sale (under s. 256) would require advertisement of the sale, and mention therein that the property is covered by a caveat would result in no sale at all.

The learned Judge, having satisfied himself that there had indeed been an offer by one Dato Wong Kee Tat to buy the land for RM61 million added that assuming the proprietor of the land and the respondents agreed that it was a fair price and were willing to close the deal, the caveat would prevent registration of the certificate of sale on the register document of title (see s. 322(2) of the Code). That he held was sufficient to make respondents/plaintiffs an aggrieved body.

We agree that the two reasons mentioned above are indeed sufficient grounds for holding that respondents are an aggrieved body.

Secondly the appellants contend that even if the respondents are an aggrieved party, the appellants have a caveatable interest *vis-a-vis* the registered proprietor, MPC Holdings Sdn. Bhd. for the reason that on the promise of a second charge of the land, the appellants have restructured the loan facilities and had forborne to sue at a time when the respondents have yet to register a charge.

Dr. Goh says that the learned trial Judge was wrong in finding that the agreement dated 17 January 1976 (p. 59 of Appeal Record) was rescinded, but that there had been a **novation** under the agreement of 31 January 1978 (pp. 87/92 of Appeal Record; Raja-MPC). We agree that he is correct but this error does not affect the outcome of this appeal.

The Raja Enterprises Limited, Dr. Goh submits, who were the registered proprietors of the land, had according to the first-mentioned agreement sold the land to Mosbert Bhd. (the vendors) who therefore became the beneficial owner. The agreement of 31 January 1978

between Raja Enterprises and MPC Holdings by which it was sold to MPC for RM10,700,000 appears to us to be indeed a novation of the earlier agreement between Mosbert and MPC Holdings dated 17 January 1976 in compliance with the agreement between Mosbert and Raja dated 26 December 1972 (see in particular clause 1(a) - p. 94 of Appeal Record).

Thus, submitted Counsel, from 1976 onwards MPC was the beneficial owner. It had tried to raise a loan to finance and complete the purchase, and the appellants took a lot of trouble to obtain the loan, the offer of which was made on the understanding that a second charge be given. It did not matter that the loan which was to be given by appellant's subsidiary, the United National Finance Berhad was not taken up; what mattered was that the understanding that a second charge be given was arrived at even before respondent's interest in financing had come about, and this fact gave appellants a caveatable interest.

Coming now to the authorities Dr. Goh referred us to *In the Matter of Registration of Caveat* Vol. VI Folio No. 46 (1908) Innes 114.

This was a petition which arose out of the refusal by the Registrar of Titles to register a caveat. The petitioner was a money-lender and had lent money to the respondent, upon the condition, (as petitioner alleged) that respondent would charge land to him as security for the loan. The charge could not be executed at the time because the certificate of title for the land was not in the respondent's possession. The promise to charge was an oral one. The petitioner, suspecting the respondent was about to dispose of the land, lodged a caveat forbidding the registration of any dealing with the land. The Registrar of Titles refused to register the caveat on the ground that the petitioner had not such an interest in the land under s. 68 of the Registration of Titles Regulation as would support a caveat.

It was ruled that the promise to charge conferred, in the circumstances upon the petitioner a caveatable interest in the land.

We agree with the learned trial Judge's observation that the facts here are different. In the authority cited, the respondent gave an unconditional promise to charge the land. In the present appeal the undertaking by MPC Holdings as the Judge correctly found was conditional upon the consent of all the unsecured creditors which, as it later informed the appellants, it had failed to procure.

Two other cases were bought to our notice. In *Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1972] 1 MLJ 145 this Court held a right in equity to a registerable interest in land is sufficient to confer on the possessor of such right a caveatable interest under s. 323(1)(a) and 323(1)(b) of the National Land Code.

In that case the appellants had obtained a permit to mining land, of which the respondents were lessees. Owing to heavy losses sustained in the mining operations it was mutually agreed that the land should be given to a third party to work on a sublease. There were differences of opinion between the appellants and the respondents as to the terms of the offer to the third party and in order to protect their rights under their agreement with the respondents the appellants lodged a caveat against the land. The respondents applied for an order to remove the caveat and the application was granted by the High Court. The appeal was allowed for the reasons mentioned earlier.

In *Jit Kaur v. Parl Singh* [1974] 2 MLJ 199 the applicant applied for an order that the caveat lodged by the respondent against certain land in Klang, Selangor, be removed under s. 327(1) of the National Land Code. It was alleged that the respondent had no interest in the land and did not have any right to claim title to or any registrable interest in the land. The respondent was a beneficiary of one Gurdial Singh (deceased) who was the original registered

proprietor of the land who had purportedly transferred the land to the applicant. The respondent had taken out letters of administration to the estate of Gurdial Singh and was seeking to challenge the validity of the transfer of the land.

It was held that the respondent had shown that he was a person entitled to apply to enter a private caveat under s. 323 of the NLC and so the application to remove the caveat should be dismissed.

To have a caveatable interest the appellants have to bring themselves within the scope of s. 323(1)(a) of the National Land Code which reads:

> 323(1) The persons and bodies at whose instance a private caveat may be entered are:
>
> (a) any person or body claiming title, or any registrable interest in, any alienated land or any right to such title or interest;

The appellants in *Inter-Continental Mining Co.* and the respondent in *Jit Kaur v. Parl Singh* came within this category of persons. We would with respect agree with the learned trial Judge that the appellants in this appeal do not come within that category for the reasons given in that part of his judgment set out below:

> It is the contention of the plaintiffs that the defendants are not a body who can claim any right to title or interest in the said land and who can come within the provisions of s. 323(1)(a) of the National Land Code. According to the plaintiffs, no money was advanced by the United National Finance Berhad to MPC Holdings for the purchase of the said land and the undertaking of MPC Holdings to give a second charge to the defendants was conditional upon MPC Holdings procuring the consent of the other creditors. Since the other creditors of MPC Holdings had refused to give their consent, MPC Holdings cannot be held on the undertaking. In support of the application for the entry of the caveat, David Tan Sin Tee, the Assistant General Manager of the defendants deposed in his a affidavit at para. 3:
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> > 3. Following this, the Bank had on 19 November 1977 approved the restructuring of the existing loans liability of RM27,021,517 due from the Companies and agreed to defer payments of the loans already due. The letter dated 19 November 1977 signed by me and addressed to the General Manager of the Banking Division of the Bank is attached as Appendix I.
>
> and at para. 6:
>
> > 6. After these forebearance to sue and restructuring facilities by the Bank were given, Dato' K.K. Sharma defaulted on making good his assurance by not using his influence to ensure the completion of the second charge over the said land.
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> Appended to the Declaration made by one Datuk Tan Seng Teck, on behalf of the defendants in support of the application for the entry of the caveat was letter from MPC Holdings which contained the following passage:
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> > 1) Restructuring of Old Facilities
> >
> > We are still in the process of trying to conform to the conditions imposed in your letter but we have so far not been able to fully comply with the following:
> >
> > a) A second charge on Taman Intan (reference to the said land) for RM6 million. We are trying to persuade the other banks to agree to this but they have so far been reluctant to do so because they wish to be better secured if they are to give trading facilities to us ...
>
> It is thus clear that MPC Holdings have given conditional undertaking to give the defendants a second charge but unable to honour the undertaking as the other creditors had refused to give their consent. It is evident that at the material time MOSCOW NARODNY BANK was

the registered chargee on the register document of title to the said land (see "DIST. 2" annexed to the Affidavit-in-Reply). Hence, the restructuring of loan facilities, if it took effect, was not related to the said land, nor was the said land purchased with a loan advanced by the defendants or any of the defendants' subsidiary. Under the circumstances, the defendants cannot claim any right to the title or interest in the said land.

We also heard arguments on the standard of proof required and on whom it lay in an application of this sort. We need only refer to a passage in the Privy Council decision in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 at p. 215:

So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The Court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the Court to be just and convenient to do so. Similarly in s. 327 it is provided that "the Court ... may make such order on the application as it may think just." The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the Court that there is a 'probability', a '*prima facie* case' or a 'strong *prima facie* case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried. *American Cyanamid v. Ethicon Ltd.*

This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 for removal of a caveat; he must first satisfy the Court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Has the caveator (the appellants) succeed in satisfying us, on the evidence that his claim to an interest in the property does arise a serious question to be tried?

Here again our answer to this question is in the negative.

The appeal is dismissed with costs here and in the Court below. Deposit to the respondents to account of taxed costs.

Also found at [1983] 1 CLJ 82